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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1945 6

No. 540 31

DR. FURMAN ANGEL, PETITIONER,

vs.

W. H. BULLINGTON

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR CERTIORARI FILED OCTOBER 19, 1945.

CERTIORARI GRANTED DECEMBER 3, 1945.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 540

DR. FURMAN ANGEL, PETITIONER,

vs.

W. H. BULLINGTON

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

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—2403

[fol. a]

IN UNITED STATES CIRCUIT COURT OF APPEALS, FOURTH CIRCUIT

No. 5310

DR. FURMAN ANGEL, Appellant,

vs.

W. H. BULLINGTON, Appellee

Appeal from the District Court of the United States for the Western District of North Carolina, at Asheville

Appendix to Brief for Appellant—Filed May 22, 1945

[fol. 1] IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NORTH CAROLINA

W. H. BULLINGTON

vs.

FURMAN ANGEL

COMPLAINT

1. The plaintiff is a citizen of the State of Virginia, and the defendant is a citizen of the State of North Carolina.

2. On or about the 4th day of March, 1940, the plaintiff entered into a contract in writing with the defendant, in which contract the defendant agreed to purchase from the plaintiff certain real estate in Roanoke County, Virginia, and the defendant agreed to pay upon the tender of a proper deed of conveyance with General Warranty and Title, the sum of $11,000.00, $100.00 of which amount defendant had paid upon the signing and execution of said contract; that of said sum defendant agreed to pay the sum of $400.00 in cash upon the delivery of said deed, to assume the payment of a certain F. H. A. loan in the sum of $7,400.00 at the rate of $55.90 per month, and further to execute and deliver to the plaintiff sixteen monthly notes to bear date [fol. 2] with said deed, fifteen of said notes being in the

sum of $200.00 cash, and one, the last, in the sum of $100.00, the first of which said notes should become due one month after the date thereof, and one each successive month until all should have been paid.

3. Pursuant to said contract and terms of same, the plaintiff on or about the 4th day of March, 1940, delivered to defendant at his discretion and request a good and sufficient warranty deed, conveying title to said land described in said contract to the defendant.

4. The defendant in partial performance of said contract paid to the plaintiff the sum of $400.00 in cash, and thereafter signed and delivered to the plaintiff, pursuant to the terms of said contract sixteen certain interest-bearing negotiable notes, each dated March 5, 1940, payable to the plaintiff at the Mountain Trust Bank of Roanoke, Virginia, the first fifteen of said notes being in the sum of $200.00, and one, the last, being in the sum of $100.00, the first of said notes payable on the 5th day of April, 1940, and one on the 5th day of each successive month thereafter until all of said notes should have been paid, which said notes bore interest at the rate of 6% per annum from date, waived homestead and all other exemptions, waived demand, presentment, protest and notice of non-payment or protest, and provided that the defendant would pay as an attorneys' fee 10% of the principal and interest of said notes if the said notes were placed in the hands of an attorney for collection; and that said notes were placed in the hands of R. R. Rush, who is a duly practicing attorney at law, for the purpose of collection.

[fol. 3] 5. That likewise on the 5th day of March, 1940, the defendant executed, signed, sealed, acknowledged, and delivered to the plaintiff a certain deed of trust, dated the 5th day of March, 1940, conveying unto Harvey B. Apperson and R. R. Rush, Trustees, the said certain tract or parcel of land lying and being in Roanoke County, Virginia, and known as the easterly portion of Lot 2 according to the Map of Deyerle Brothers Subdivision, which map is of record in the Clerk's Office of the Circuit Court of Roanoke County, Virginia, in Plat Book 2, page 97, the purpose of which said deed of trust was, and it did, secure unto the undersigned the payment of the aforesaid and described notes.

6. That the said deed of trust provided among other things that should default be made in the payment of any part of the debt secured in said deed of trust, principal, or interest, at the maturity of such part, or in the event of a breach of any of the covenants entered into or imposed upon the defendant, then the entire obligation of the said deed of trust and the whole debt thereby secured should, at the option of the beneficiary, become forthwith due and payable; that defendant did fail to pay one of said notes in the sum of $200.00 which became due April 5, 1940, and that the said beneficiary exercised his option so to do and did declare the whole of the aforesaid described notes executed by the defendant, forthwith due and payable.

7. That said deed of trust likewise provided that the defendant would pay all taxes, levies, and assessments upon said property, and that defendant would keep the [fol. 4] improvements on the property insured against fire in some solvent insurance company approved by the Trustee for the benefit of the beneficiaries hereunder in the sum of at least $3,000.00, and would deposit with the Trustee the policies with standard loss payable clauses with full contribution in favor of the Trustee as his interest might appear.

8. That notwithstanding the defendant's said several promises, agreements, and undertakings the defendant did fail and refuse, and although often so requested to do has continued to fail and refuse, to pay said notes of $200.00 each, one of which became due on the 5th day of April, 1940, and another of which because due on the 5th day of May, 1940, or any of said notes. That the defendant likewise failed and refused to pay said taxes and assessments on said property, and failed and refused to deliver and deposit with the trustees under said deed of trust or either of them, policy or policies of insurance as in said deed of trust provided.

9. That the defendant likewise assumed and agreed to pay off as it matured a certain F. H. A. loan, dated February 28, 1940, securing the payment of the sum of $7,400.00 payable in monthly installments of $55.90, which said installments included 1/12 of the annual hazard insurance premium and 1/12 of the annual taxes and assessments

due to the County of Roanoke, Virginia. That an installment of said loan was due on April 1st and May 1st, but that defendant wholly failed and refused, and still fails and refuses, to pay the same.

10. That the plaintiff, who was, and is, the legal holder [fol. 5] of the said sixteen notes secured in said deed of trust from the defendant to Harvey B. Apperson and R. R. Rush, Trustees, did elect to declare the whole amount of said debt secured by said deed of trust due and payable, and by reason of defendant's failure to pay said installments of $200.00, and his failure to perform the said other covenants and agreements in said deed of trust confained, did direct R. R. Rush, one of said Trustees under said deed of trust, to execute the powers therein conferred upon him and to sell said property to accomplish the purposes of said trust. That the said R. R. Rush, Trustee, did after advertising the said property for sale at public auction in compliance with the terms of said deed of trust, offer the same for sale at public auction on the 29th day of May, 1940, at which sale the plaintiff became the purchaser thereof for the sum of $25.00. That the said property was sold and purchased by the plaintiff for the said sum of $25,00, subject to the said deed of trust securing the payment of $7,400.00 to the Life and Casualty Insurance Company of Tennessee, Inc.

11. That the said Trustee, as required by the law of the State of Virginia, did file with the Commissioner of Accounts of the Circuit Court of Roanoke County, Virginia, a copy of his settlement showing the manner in which he performed his duties as Trustee and disbursed the funds coming into his hands as such Trustee. A copy of said Trustee's settlement is hereto attached and hereby expressly made a part of this complaint.

12. That the said Trustee caused to be endorsed upon the first of said notes of $200.00 a credit of $3.83 as of [fol. 6] the 29th day of May, 1940, to which credit defendant is entitled upon said note.

Wherefore, the plaintiff demands judgment of the defendant for the sum of $3,100.00, with interest from the 5th day of March, 1940, together with 10% of said amount as attorneys' fees, subject to a credit of $3.83, as of the

29th day of May, 1940, and the further sum of $99.85 with interest from the 29th day of May, 1940, and costs.

W. R. Francis, Attorney for the Plaintiff, Waynesville, North Carolina; R. R. Rush, Attorney for the Plaintiff, Roanoke, Virginia.

Duly sworn to by W. H. Bullington. Jurat omitted in printing.

[fol. 7] IN UNITED STATES DISTRICT COURT

ANSWER

[Title omitted]

The defendant, Furman Angel, answering the complaint of plaintiff, for his answer, says:

1.

That the allegations of paragraph one are not denied.

2.

That the allegations of paragraph two are admitted. Defendant herewith attaches to this Answer a copy of the contract referred to in paragraph two of the complaint as Exhibit A, and asks that same be taken as a part of this answer.

3.

In answer to paragraph three, defendant admits that on the 5th day of March, 1940, the plaintiff delivered to the defendant a deed, copy of which is hereto attached, marked [fol. 8] Exhibit B, and asked to be taken as a part of this Answer. Except as above admitted, the allegations of paragraph three of the complaint are untrue and denied.

4.

In answer to paragraph four, defendant admits that he paid to the plaintiff the sum of Five Hundred ($500.00) Dollars in cash, and delivered to the plaintiff sixteen notes, each bearing date March 5, 1940, payable to the plaintiff; that said notes speak for themselves as to their contents, and this defendant denies all allegations which are in conflict with the terms and provisions of said notes. Except as

above admitted, the allegations of paragraph four of the complaint are untrue and denied.

5.

In answer to the allegations of paragraph five, defendant admits that on the 5th day of March, 1940, the defendant executed and delivered to the plaintiff a certain deed of trust conveying to Harvey B. Apperson and R. R. Rush, Trustees, certain property; that said deed of trust speaks for itself and all allegations not in conformity with the provisions thereof are hereby denied. A copy of said deed of trust is hereto attached, marked Exhibit C and asked to be taken as a part of this answer. Except as admitted, the allegations of paragraph five are untrue and denied.

6.

In answer to paragraph six, this defendant says that the deed of trust heretofore set out as Exhibit C speaks for itself and for all the terms and conditions therein contained. [fol. 9] That all allegations in conflict with the terms of said deed of trust are denied.

7.

That in answer to paragraph seven, this defendant says that the deed of trust heretofore set out as Exhibit C speaks for itself and for all the terms and conditions therein contained. That all allegations in conflict with the terms of said deed of trust are denied.

8.

In answer to paragraph eight, defendant admits that he did not pay the note which fell due on April 5, 1940, and the one which fell due on May 5, 1940; nor has he, due to the fact that plaintiff has purchased the property from the trustee and is the owner of same, paid any of the notes; nor has he paid any of the taxes or insurance on said property.

9

That in answer to paragraph nine, this defendant says that the deed of trust heretofore set out as Exhibit C speaks for itself and for all the terms and conditions therein contained. That all allegations in conflict with the terms

of said deed of trust are denied. Further answering said paragraph nine, defendant admits that since the plaintiff purchased said property from the trustees and became the owner thereof he, the defendant, did not pay the installments coming due April 1, and May 1, set out in paragraph nine of the complaint.

10.

In answer to paragraph ten, defendant says he has [fol. 10] no knowledge or information sufficient to form a belief as to the truth of the allegations therein contained and therefore same are denied, with the exception, however, defendant is advised, informed and believes that R. R. Rush, trustee, did advertise and sell the property in question, at which time plaintiff became the purchaser thereof.

11.

In answer to paragraph eleven, defendant says he has no knowledge or information sufficient to form a belief as to the truth of the allegations therein contained and therefore same are denied.

12.

In answer to paragraph twelve, defendant says he has no knowledge or information sufficient to form a belief as to the truth of the allegations therein contained and therefore same are denied.

And, for another and further answer and defense to plaintiff's alleged cause of action, this defendant says:

1.

That when defendant purchased from plaintiff the property referred to in the complaint and executed the contract, notes and deed of trust referred to herein, he paid to the plaintiff the sum of $500.00 in cash which sum the plaintiff has at all times retained, and for which this defendant received no benefit.

2.

That prior to March 5, 1940, the date upon which [fol. 11] the deed of trust and notes were executed, the Legislature of North Carolina, by Chapter 36 of the Pub-

lic Laws of 1933, C.S. 2593 (F) had enacted a law adopting the policy of refusing to permit deficiency judgment in all sales of real property by mortgagees and/or trustees, under the powers of sale contained in any mortgages or deeds of trust executed after the enactment of said Statute, or where judgments or decrees are given for the foreclosure of any mortgage or deed of trust after the ratification of said act. That said Statute, among other things provided as follows:

> "In all sales of real property by mortgagees and /or trustees under the powers of sale contained in any mortgage or deed of trust hereafter executed, or where judgment or decree is given for the foreclosure of any mortgage executed after the ratification of this section to secure payment of the balance of the purchase price of real property, the mortgagee or trustee or holder of the notes secured by said mortgage or deed of trust shall not be entitled to a deficiency judgment on account of said mortgage, deed of trust, or obligation secured by the same"

3.

That at the time of the sale of the property under the deed of trust which was conducted for the purpos/ of collecting for plaintiff the balance of unpaid purchase price of said property represented by notes and deed of trust. above referred to, plaintiff became the purchaser of said property. That this action on the part of the plaintiff [fol. 12] is brought for the purpose of obtaining against the defendant, judgment for the deficiency between the contract price at which defendant purchased said property and the amount which said property, at the bid of plaintiff, brought at the sale thereof under the deed of trust.

4.

That by reason of the enactment of the Statute above referred to and the fact that this action is brought to recover a deficiency judgment which is in conflict with said Act, the plaintiff's action can not be sustained, and defendant specifically pleads said Act and said sections thereof in bar of plaintiff's right to recover herein.

And for another and second further answer and defense to plaintiff's alleged cause of action, defendant says:

1.

That on the 29th day of July, 1940, the plaintiff, W. H. Ballington, herein, instituted an action against this defendant in the Superior Court of Macon County, North Carolina, seeking to recover of this defendant judgment on the identical notes secured by the identical deed of trust sued upon in this action, alleging in the complaint that the plaintiff had sold the property in question to the defendant, and that the defendant had failed to make payments, as alleged in this action; that the allegations of the complaint in said cause are almost in the exact language of the complaint filed in this cause; that a copy of the summons [fol. 13] and complaint so filed by the plaintiff in said first action, are hereto attached marked Exhibit D and asked to be made and taken as a part of this answer.

2.

That to said complaint this defendant filed a demurrer, copy of which is attached hereto, marked Exhibit E and asked to be taken as a part of this answer; that said demurrer was based upon the ground that the State of North Carolina had enacted Chapter 36 of the Public Laws of 1933 C.S. 2593 (F), and that therefore plaintiff could not maintain said action; that when the cause come on for trial in the Superior Court, His Honor Felix E. Alley, Judge presiding, overruled the demurrer, copy of which demurrer is hereto attached, marked Exhibit E, as aforesaid.

3.

That thereupon the defendant appealed said ruling by the Honorable Felix E. Alley, to the Supreme Court, the Court of last resort in the State of North Carolina, which said Court reversed said judgment and held that the Statute, to-wit, said Chapter 36 of the Public Laws of 1933 of North Carolina, C.S. 2593 (F), was binding on all sales coming under the provisions of said statute, including those predicated upon notes secured by mortgages or deeds of trust executed in another State upon realty lying therein. That the opinion of said Court is recorded in Volume 220,

Page 18, North Carolina Reports, and is asked to be taken as a part of this answer.

4.

[fol. 14] That in conformity with said opinion, a judgment was entered in the Superior Court of Macon County, finally terminating said action in favor of this defendant and against the plaintiff herein. A copy of said judgment is hereto attached, marked Exhibit F and asked to be made a part hereof.

So, this defendant now avers and says that the judgment of the Supreme Court of North Carolina, rendered at the Fall Term, 1941, as aforesaid, and the judgment of the Superior Court of Macon County, N. C., rendered in conformity therewith, based upon an identical cause of action with the one herein set out, constitutes an estoppel and bar against the plaintiff herein and precludes him from maintaining this action; and said action together with the pleadings and judgments therein set out, are hereby specifically pleaded as an estoppel and in bar of plaintiff's right to maintain this action.

Wherefore, having fully answered, this defendant prays the Court that plaintiff take nothing by reason of his action; that his cause of action be dismissed and that defendant go hence without day and recover his costs herein incurred.

Jones & Jones, Jones, Ward & Jones, Attorneys for Defendant.

[fol. 15] *Duly sworn to by Dr. Furman Angel. Jurat omitted in printing.*

[fol. 16] IN UNITED STATES DISTRICT COURT

[Title omitted]

STIPULATION AS TO FACTS

It is hereby stipulated between the plaintiff and the defendant that the above action is submitted to the court for decision upon the following facts:

(1) The plaintiff is a citizen of the State of Virginia, and the defendant is a citizen of the State of North Carolina.

(2) On or about the 4th day of March, 1940, the plaintiff entered into a contract in writing with the defendant, in

which contract the defendant agreed to purchase from the plaintiff certain real estate in Roanoke County, Virginia, and the defendant agreed to pay upon the tender of a proper deed of conveyance with General Warranty of Title, the sum of $11,000.00, $100.00 of which amount defendant had paid upon the signing and execution of said contract; that of said sum defendant agreed to pay the sum of $400.00 in cash upon the delivery of said deed; to assume the payment of a certain F. H. A. loan in the sum of $7,400.00 at the rate [fol. 17] of $55.90 per month, and further to execute and deliver to the plaintiff sixteen monthly notes to bear date with said deed, fifteen of said notes being in the sum of $200.00 cash, and one, the last, in the sum of $100.00, the first of which said notes should become due one month after the date thereof, and one each successive month until all should have been paid, that a true copy of said contract is attached to defendant's answer marked "Exhibit A".

(3) Pursuant to said contract and terms of same, the plaintiff on or about the 5th day of March, 1940, delivered to defendant a warranty deed conveying title to said land described in said contract; that a true copy of said deed is attached to defendant's answer marked "Exhibit B".

(4) The defendant in partial performance of said contract paid to the plaintiff the sum of $400.00 in cash, in addition to $100 paid upon execution of contract, and thereafter signed and delivered to the plaintiff; pursuant to the terms of said contract sixteen certain interest-bearing negotiable notes, each dated March 5, 1940, payable to the plaintiff at the Mountain Trust Bank of Roanoke, Virginia, the first fifteen of said notes being in the sum of $200.00, and one, the last, being in the sum of $100.00, the first of said notes payable on the 5th day of April, 1940, and one on the 5th day of each successive month thereafter until all of said notes should have been paid, which said notes bore interest at the rate of 6% per annum from date.

(5) That likewise on the 5th day of March, 1940, the [fol. 18] defendant executed, signed, sealed, acknowledged, and delivered to the plaintiff a certain deed of trust, dated the 5th day of March, 1940, conveying unto Harvey B. Apperson and R. R. Rush, Trustees, the said certain tract of parcel of land lying and being in Roanoke County, Virginia, and known as the easterly portion of Lot 2 according

to the Map of Deyerle Brothers Subdivision, which map is of record in the Clerk's office of the Circuit Court of Roanoke County, Virginia, in Plat Book 2, Page 97, the purpose of which said deed of trust was, and it did, secure unto the undersigned the payment of the aforesaid and described notes; that true copy of said deed of trust is attached to defendant's answer and marked "Exhibit C".

(6) That the said deed of trust provided among other things that should default be made in the payment of any part of the debt secured in said deed of trust, principal, or interest, at the maturity of such part, or in the event of a breach of any of the covenants entered into or imposed upon the defendant, then the entire obligation of the said deed of trust and the whole debt thereby secured, should, at the option of the beneficiary, become forthwith due and payable; that defendant failed to pay one of said notes in the sum of $200.00 which became due April 5, 1940, and that the said beneficiary exercised his option so to do and did declare the whole of the aforesaid described notes executed by the defendant, forthwith due and payable.

(8) That defendant did fail to pay said notes of $200.00 [fol. 19] cash, one of which became due on the 5th day of April, 1940, and another of which became due on the 5th day of May, 1940, or any of said notes. That the defendant likewise failed to pay said taxes and assessments on said property and failed to deliver and deposit with the trustees under said deed of trust or either of them policy or policies of insurance.

(9) That the defendant likewise assumed and agreed to pay off as it matured a certain F. H. A. loan, dated February 28, 1940, securing the payment of the sum of $7,400.00 payable in monthly installments of $55.90, which said installments included 1/12 of the annual hazard insurance premium and 1/12 of the annual taxes and assessments due to the County of Roanoke, Virginia. That an installment of said loan was due on April 1st and May 1st, but that defendant wholly failed and refused, and still fails and refuses, to pay the same.

(10) That the plaintiff, who was, and is, the legal holder of the said sixteen notes secured in said deed of trust from the defendant to Harvey B. Apperson and R. R. Rush,

Trustees, did elect to declare the whole amount of said debt secured by said deed of trust due and payable and by reason of defendant's failure to pay said installments of $200.00 and his failure to perform the said other covenants and agreements in said deed of trust contained did direct R. R. Rush, one of said Trustees, under said deed of trust, to execute the powers therein conferred upon him and to sell said property to accomplish the purposes of said trust. That the said R. R. Rush, Trustee, did after advertising the [fol. 20] same property for sale at public auction in compliance with the terms of said deed of trust, offer the same for sale at public auction on the 29th day of May, 1940, at which sale the plaintiff became the purchaser thereof for the sum of $25.00. That the said property was sold and purchased by the plaintiff for the said sum of $25.00 subject to the said deed of trust securing the payment of $7,400.00 to the Life and Casualty Insurance Company of Tennessee, Inc., a copy of said advertisement of sale is hereto attached marked "Exhibit X".

(11) That the said Trustee, as required by the law of the State of Virginia, did file with the Commissioner of Accounts of the Circuit Court of Roanoke County, Virginia, a copy of his settlement showing the manner in which he performed his duties as Trustee and disbursed the funds coming into his hands as such Trustee. A copy of said Trustee's Settlement is attached and made a part of the complaint, filed herein.

(12) That the said Trustee caused to be endorsed upon the first of said notes of $200.00 a credit of $3.83 as of the 29th day of May, 1940, to which credit defendant is entitled upon said note.

(13) That the defendant took possession of said real estate, and occupied the same for a period of a few days in excess of one month immediately following the execution and delivery of said deed from said plaintiff to said defendant.

(15) That the court will take due notice of the applicable statutes of North Carolina and Virginia which may be referred to by counsel in argument.

[fol. 21] (16) That on the — day of —, 1940, the plaintiff, W. H. Bullington, herein, instituted an action against

this defendant in the Superior Court of Macon County, North Carolina, seeking to recover of this defendant judgment on the identical note secured by the identical deed of trust sued upon in this action, alleging in the complaint that the plaintiff had sold the property in question to the defendant, and that the defendant had failed to make payments as alleged in this action; that the allegations of the complaint in said cause are almost in the exact language of the complaint filed in this cause; that a true copy of the summons and complaint so filed by the plaintiff in said first action, are attached to defendant's answer marked "Exhibit D".

(17) That to said complaint this defendant filed a demurrer, copy of which is attached to defendant's answer marked "Exhibit E"; that said demurrer was based upon the ground that the State of North Carolina had enacted Chapter 36 of the Public Laws of 1933, C. S. 2593 (F), and that therefore could not maintain said action; that when the cause came for trial in the Superior Court, His Honor Felix E. Alley, Judge presiding, overruled the demurrer, copy of which demurrer is attached to said answer marked "Exhibit E".

(18) That thereupon the defendant appealed said ruling by the Honorable Felix E. Alley, to the Supreme Court, the Court of last resort in the State of North Carolina, which said Court reversed said judgment; that the opinion of said Court is reported in Volume 220, Page 18, North Carolina [fol. 22] Reports, and 16, S. E. (2nd) 411, a copy of which is hereto attached marked "Exhibit Y".

(19) That in conformity with said opinion, a judgment was entered in the Superior Court of Macon County, finally terminating said action in favor of this defendant and against the plaintiff herein. A copy of said judgment is attached to said answer marked "Exhibit F".

R. Roy Rush; W. R. Francis; Jones & Jones; Jones, Ward & Jones, Attorneys for Plaintiff.

[fol. 23] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF NORTH CAROLINA, ASHEVILLE DIVISION.

W. H. BULLINGTON,

vs.

FURMAN ANGEL

JUDGMENT

Upon the stipulation or agreed statement of facts in this case, I am of the opinion that the plaintiff is entitled to recover from the defendant the sum of Three Thousand One Hundred Dollars ($3,100.00), and it is therefore

Ordered and Adjudged that the plaintiff recover of the defendant the sum of Three Thousand One Hundred Dollars ($3,100.00) with interest thereon from the 5th day of March, 1940.

It Is Further Ordered that the defendant pay the costs of the action as taxed by the Clerk.

This the 3d day of August, 1944.

E. Y. Webb, United States District Judge.

[fol. 24] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF NORTH CAROLINA, ASHEVILLE DIVISION.

W. H. BULLINGTON,

vs.

FURMAN ANGEL

MEMORANDUM OPINION

The sole question presented by the agreed statement of facts is whether the provisions of the Law of North Carolina, Chapter 36, Public Laws 1933, bar the plaintiff from maintaining this suit in this Court. This statute undertakes to prevent any person from securing a deficiency judgment "On account of mortgage, deed of trust or obligation secured by same."

This plaintiff, in spite of the statute, brought suit in the Superior Court of North Carolina, to secure judgment on the unpaid notes amounting to Three Thousand One Hun-

dred Dollars ($3,100.00) which is admitted was a deficiency. The Superior Court Judge held that the plaintiff was entitled to recover but, when the case was carried to the Supreme Court of North Carolina, it reversed the holding of the Superior Court Judge and denied the plaintiff the right to recover in the state court.

[fol. 25] Judge Schenck, in writing the opinion of the Court, among other things said, "It will be noted that the limitations created by the statute is upon the *jurisdiction* of the Court, in that it is declared that the holders of notes given to secure the purchase price of real property 'shall not be entitled to a deficiency judgment on account' thereof. This closes the courts of this state to one who seeks a deficiency judgment on a note given for the purchase price of the property * * * It is a limitation of the jurisdiction of the courts of this state."

Do this statute and the decision of the Supreme Court likewise limit the jurisdiction of the federal court?

I think not. During my nearly twenty-five years on the federal bench, I have scrupulously respected and guarded the rights of the states, but I cannot now go so far as to hold that the Legislature of North Carolina can deprive a non-resident of the right to come into this Court and sue a local defendant to recover an amount in excess of three thousand dollars which is admittedly due the plaintiff. The plaintiff is a resident of Virginia. The land mortgaged lies in Virginia. The deed of trust signed by the defendant was a Virginia contract and the notes signed by the defendant were made payable at a bank in Roanoke, Virginia.

It is the contention of the defendant that the state has established its public policy closing the doors of its courts to deficiency judgments and that a federal court sitting in this state is bound by the act of the Legislature.

[fol. 26] The jurisdiction of this Court so far as the present case is concerned is conferred by the United States Statute in the following language: "The district Courts shall have original jurisdiction as follows:

> "First, Of all suits of a civil nature, at common law or in equity * * * where the matter in controversy exceeds the sum or value of three thousand dollars and * * * is between citizens of different states * * *"

In the case of *Barrow Steamship Company* v. *King*, 170 U. S. 100, the Court said: "The jurisdiction so conferred upon the national courts cannot be abridged or impaired by any statute of a state."

In the case of *Stevenson* v. *Grand Trunk Western Railroad Company*, 110 Federal Reporter, Second Series, Page 401, it was held that the State of Illinois could not close the doors of the federal courts in Illinois for a wrongful death occurring in Michigan. The Legislature of Illinois passed a statute forbidding the bringing or prosecution of any action in Illinois to recover damages for death by wrongful act occurring outside the state.

Judge Major, Circuit Judge, speaking for the Court, among other things, said: "Defendant argues that the decision in *Erie Railroad Company* v. *Tompkins*, 304 U. S. 64 requires a federal court to follow a state policy as expressed in legislative enactment or the decisions of its courts. We do not think this case has any application, even though the Court was considering the construction to be given Section 34 of the Federal Judiciary Act."

[fol. 27] "The jist of that opinion is found in the statement of the Court: 'Except in matters governed by the Federal constitution or by acts of the Congress, the law to be applied in any case is the law of the state.' It will be observed that 'matters governed by the federal constitution or by acts of Congress' are excepted, as might be expected."

Judge Major continues: "If the Congress or the federal courts have no power or supervision over the state, when acting through its legislature or its court, it must be equally true that the latter is without power of control or supervision over the federal courts. That which was held in the Tompkins case must be confined, we think, solely to matters of substance and not of jurisdiction. To hold otherwise would lead to the illogical conclusion that the jurisdiction of federal courts not only may be limited, but abrogated by the edict of the state legislature or decision of the supreme Court of the state in which the federal court sits. We assume that the state has the power to determine the jurisdiction of its own courts as it sees fit, but it does not follow that likewise it may determine the jurisdiction of the federal court under the theory that the latter is required to follow the public policy of the former.

This case was carried to the Supreme Court of the United

States upon a writ of certiorari but was later dismissed without opinion.

I might say that I have read, I think, every decision which bears on this question, and certainly all the decisions referred to by counsel in their argument and briefs, and [fol. 28] this case comes nearest fitting the case at bar than any one that I have been able to find.

The contract sought to be enforced in this Court by the plaintiff is a legal obligation under the laws of the State of Virginia; indeed, there is nothing immoral or illegal about it in North Carolina. The plaintiff is a resident of Virginia, as before stated, and is, therefore, a non-resident of the State of North Carolina and is seeking to enforce in this Court an obligation which is regarded as legal in his state where the contract was made and where the notes were payable.

I must, therefore, conclude that the plaintiff is entitled to seek the jurisdiction of this Court regardless of the act of the Legislature of North Carolina, Public Laws of 1933, and is entitled to a judgment for Three Thousand One Hundred Dollars ($3,100.00), and I have so ordered.

This the 3d day of August, 1944.

E. Y. Webb, United States District Judge.

[fol. 29] PROCEEDINGS IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 5310

DR. FURMAN ANGEL, Appellant;

versus

W. H. BULLINGTON, Appellee

Appeal from the District Court of the United States for the Western District of North Carolina, at Asheville

September 22, 1944, the transcript of record is filed and the cause docketed.

September 25, 1944, the appearance of R. Roy Rush is entered for the appellee.

September 26, 1944, the appearance of Gilmer Jones, R. S. Jones, G. Lyle Jones and George H. Ward is entered for the appellant.

Same day, statement under section 3 of Rule 10 is filed.

September 27, 1944, the appearance of W. Roy Francis is entered for the appellee.

October 2, 1944, stipulation to continue case to the June Term is filed and submitted to Parker, Soper and Dobie, Circuit Judges.

ORDER CONTINUING CASE TO JUNE TERM, 1945—Filed and Entered October 2, 1944

(Style of Court and Title Omitted)

Upon the Stipulation and Agreement of counsel for the respective parties in the above-entitled case,

It Is Ordered By The Court that this case be, and [fol. 30] the same is hereby, continued from the November term, 1944, to the June term, 1945 of this Court.

October 2, 1944.

John J. Parker, Senior Circuit Judge.

May 22, 1945, brief on behalf of appellant is filed.

Same day, appendix to brief of appellant is filed.

June 4, 1945, brief on behalf of appellee is filed.

ARGUMENT OF CAUSE

June 12, 1945 (June Term, 1945), cause came on to be heard before Parker, Soper and Dobie, Circuit Judges, and was argued by counsel and submitted.

[fol. 31] OPINION—Filed July 19, 1945

UNITED STATES CIRCUIT COURT OF APPEALS, FOURTH CIRCUIT

No. 5310

DR. FURMAN ANGEL, Appellant,

versus

W. H. BULLINGTON, Appellee

Appeal from the District Court of the United States for the Western District of North Carolina, at Asheville. Civil Action

(Argued June 12, 1945. Decided July 19, 1945)

Before Parker, Soper and Dobie, Circuit Judges

R. S. Jones (Jones & Jones and Jones, Ward & Jones on brief) for Appellant; and R. Roy Rush (W. Roy Francis on brief) for Appellee.

[fol. 32] DOBIE, Circuit Judge:

W. H. Bullington, as vendor, and Furman Angel, as vendee, entered (in Virginia) into a contract (to be performed in Virginia) for the sale of land in Virginia. A deed was duly executed, part of the purchase price was paid, and notes (secured by deed of trust on the land) for the balance of the purchase price were made by the vendee. Upon default in the payment of one of these notes, the vendor, under an accelerating clause in the deed of trust, declared the other notes due and called on the trustees to sell the land. The proceeds of the sale were applied to the payment of the notes, but there was still a deficiency due on these notes.

The vendor sued the vendee for the deficiency in a court of the State of North Carolina. That court overruled

a demurrer of the defendant, but this ruling was reversed by the Supreme Court of North Carolina, which held that such a deficiency judgment could not be granted by a state court of North Carolina by virtue of a statute of that state (N. C. Code of 1939, Michie, § 2593(f)). *Bullington* v. *Angel*, 220 N. C. 18, 16 S. E. (2d) 411.

The vendor thereupon instituted against the vendee a civil action for the deficiency in the United States District Court for the Western District of North Carolina. Judge Webb, sitting in that court without a jury, entered judgment in favor of the vendor for the deficiency.

This appeal of the vendee presents a single question. Does the North Carolina statute prevent, as to the contract [fol. 33] in question (which is conceded to be valid under the law of Virginia) the recovery of a deficiency judgment in a District Court of the United States, sitting in North Carolina? Judge Webb answered (Correctly, we think) this question in the negative.

The statute of North Carolina reads, in part:

"In all sales of real property by mortgagees and/or trustees under powers of sale contained in any mortgage or deed of trust hereafter executed, or where judgment or decree is given for the foreclosure of any mortgage executed after the ratification of this act to secure payment of the balance of the purchase price of real property, the mortgagee or trustee or holder of the notes secured by such mortgage or deed of trust shall not be entitled to a deficiency judgment on account of such mortgage, deed of trust or obligation secured by the same * * *"

This statute did not render void the obligation, secured by the mortgage or deed of trust, insofar as it furnishes a basis for a deficiency judgment in a foreclosure proceeding. The Supreme Court of North Carolina has construed the statute to be merely a limitation on the jurisdiction of the State courts which closes them to one who seeks such a judgment. When the instant case was before the Supreme Court of North Carolina in *Bullington* v. *Angel*, 220 N. C. 18, Associate Justice Schenck meticulously stated:

"It will be noted that the limitation created by the statute is upon the jurisdiction of the court in that it is declared that the holder of notes given to secure the purchase price of real property 'shall not be entitled to a deficiency judg-

[fol. 34] ment on account' thereof. This closes the courts of this State to one who seeks a deficiency judgment on a note given for the purchase price of real property. The statute operates upon the adjective law of the State, which pertains to the practice and procedure, or legal machinery by which the substantive law is made effective, and not upon the substantive law itself. It is a limitation of the jurisdiction of the courts of this State."

This interpretation of the statute, which is binding on us, makes it crystal clear that the statute is a limitation on the jurisdiction of the courts; that it operates in the field of adjective or procedural law, not in the realm of the substantive law of rights. It is well settled that when a claim or cause of action exists, and the jurisdictional requisites prescribed by the Constitution and laws of the United States obtain, a federal District Court has jurisdiction; and this jurisdiction cannot be limited or taken away by state statutes. This has been consisfently held by the Supreme Court of the United States in a long line of cases. See, *Suydam* v. *Broadnax* (1840), 14 Pet. 67, 10 L. Ed. 357; *Union Bank* v. *Vaiden* (1855), 18 How. 506, 15 L. Ed. 472; *Chicago & N. W. Ry. Co.* v. *Whitton* (1871), 13 Wall. 270, 20 L. Ed. 571; *David Lupton's Sons* v. *Automobile Club of America* (1912) 225 U. S. 489, 32 S. Ct. 711, 56 L. Ed. 1177. See, also, Moore, Federal Practice, V. I. § 207, p. 208; Dobie on Federal Procedure, § 86, p. 336; Article 3 § 2 of the Federal Constitution, 28 U. S. C. A. § 41(1).

The question before us is not unlike that considered in *David Lupton's Sons* v. *Auto. Club of Am.*, 225 U. S. 489, [fol. 35] where it was held that the Federal court in New York was not deprived of jurisdiction to entertain a suit for breach of contract brought by a Pennsylvania corporation which had done business in New York contrary to its statutes which prohibited a foreign corporation from doing business therein without complying with certain prescribed conditions. The courts of New York had construed the statute not to invalidate a contract made by a corporation under such conditions, but merely to provide that no action on such a contract should be maintained in the courts of the State. Holding that such a statute did not limit the jurisdiction of the Federal courts the Supreme Court said: (pp. 499-500)

"It must follow, * * * that the Lupton Company, whether or not it was doing a local business in New York, had the right to bring this suit in the Federal court. The State could not prescribe the qualifications of suitors in the courts of the United States, and could not deprive of their privileges those who were entitled under the Constitution and laws of the United States to resort to the Federal courts for the enforcement of a valid contract."

Associate Justice Schenck held that the North Carolina statute under consideration was applicable (as to the courts of the State of North Carolina) to claims "secured by real estate in a State other than North Carolina". (220 N. C. 21). This raises the interesting questions whether the statute as thus interpreted runs afoul of the full faith and credit clause of Article 4 §1 of the Federal Constitution or the due process [fol. 36] Clause of § 1 of the Fourteenth Amendment. We do not here pass upon these questions. See, *Hartford Acc. & Ind. Co. Delta*, 292 U. S. 123; *Broderick* v. *Rosner*, 294 U. S. 629; *Milwaukee County* v. *M. E. White Co.*, 296 U. S. 268; *Home Ins. Co.* v. *Dick*, 281 U. S. 397; *John Hancock Mutual Life Ins. Co.* v. *Yates*, 299 U. S. 178; *Bradford Electric Light Co.* v. *Clapper*, 286 U. S. 145; *Alaska Packers Ass'n.* v. *Industrial Acc. Comm'n.*, 294 U. S. 532; *Griffin* v. *McCoach*, 313 U. S. 498.

The very recent case of *Guaranty Trust Co. of N. Y.* v. *York*, 13 L. W. 4564, decided by the Supreme Court June 18, 1945, after the argument in the pending case, has come to our attention. It holds specifically that an action which would be barred by a State statute of limitations, if brought in a State court, would also be barred if brought in a Federal court in equity in the same State under the provisions of the Federal statutes relating to diversity of citizenship. The burden of the decision, which follows the principle of *Erie Railway Co.* v. *Tompkins*, 304 U. S. 202, is that "since a Federal court adjudicating a State created right solely because of the diversity of citizenship of the parties is for that purpose in effect only another court of the State, it cannot afford recovery if the right to recover is made unavailable by the State nor can it substantially affect the enforcement of the right as given by the State". It will be noticed that the cause of action there under consideration arose under the law of the State in which the action was brought whereas in the pending case the cause of action [fols. 37-38] was based upon a contract executed under the

law of another State. We think, moreover, that the decision does not affect the rule that a State statute cannot restrict the jurisdiction of the Federal courts based on diversity of citizenship, and that the decision does not relate to the questions, discussed in the cases last cited, as to how far the public policy of a State may modify its obligations under the full faith and credit clause of the Federal Constitution or the due process clause of the Fourteenth Amendment.

The judgment of the District Court is Affirmed.

[fol. 39] JUDGMENT—Filed and entered July 19, 1945

UNITED STATES CIRCUIT COURT OF APPEALS, FOURTH CIRCUIT

No. 5310

DR. FURMAN ANGEL, Appellant,

vs.

W. H. BULLINGTON, Appellee

Appeal from the District Court of the United States for the Western District of North Carolina

This Cause came on to be heard on the transcript of the record from the District Court of the United States for the Western District of North Carolina, and was argued by counsel.

On Consideration Whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, affirmed with costs.

John J. Parker, Senior Circuit Judge; Morris A. Soper, U. S. Circuit Judge; Armistead M. Dobie, U. S. Circuit Judge.

On another day, to-wit, August 20, 1945, the mandate of this Court, in this cause, is issued and transmitted to the District Court of the United States for the Western District of North Carolina, at Asheville, in due form.

[fol. 40] STIPULATION

IN THE SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1945

No. —

DR. FURMAN ANGEL, Petitioner,

versus

W. H. BULLINGTON, Respondent

Subject To This Court's Approval, It Is Hereby Stipulated and Agreed, by and between the attorneys for the respective parties hereto, that for the purpose of the Petition for a writ of Certiorari, the printed record may consist of the following:

1. Appendix to the Petitioner's brief in the United States Circuit Court of Appeals for the Fourth Circuit.

2. The proceedings had before the United States Circuit Court of Appeals for the Fourth Circuit.

It Is Further Stipulated and Agreed that Petitioner will cause the Clerk of the United States Circuit Court of Appeals for the Fourth Circuit to file with the Clerk of the Supreme Court the entire transcript of the record on appeal, including exhibits, in and opinion by the Circuit Court of Appeals for the Fourth Circuit; and that, in the event that the Petition for Writ of Certiorari be granted, the printed record shall consist of the proceeding in the court below and such portions of the entire transcript of the record on appeal, including exhibits, in that court as the parties may designate.

[fol. 41] It Is Further Stipulated and Agreed that either of the parties hereto may refer in his brief to the record filed in the Supreme Court of the United States.

G. Lyle Jones, Geo. H. Ward, Attorneys for Petitioner. —— ——, R. R. Rush, Attorneys for Respondent.

Dated this 27 day of September, 1945.

[fol. 42] CLERK'S CERTIFICATE

UNITED STATES OF AMERICA,
Fourth Circuit, ss:

I, Claude M. Dean, Clerk of the United States Circuit Court of Appeals for the Fourth Circuit, do certify that the foregoing is a true copy of the appendix to brief for appellant, and the proceedings in the said Circuit Court of Appeals in the therein entitled cause, as the same remain upon the records and files of the said Circuit Court of Appeals, and constitute and is a true transcript of the record and proceedings in the said Circuit Court of Appeals in the said cause, made up in accordance with the stipulation of counsel for the respective parties, for use in the Supreme Court of the United States on application for a writ of certiorari.

In Testimony Whereof, I hereto set my hand and affix the seal of the said United States Circuit Court of Appeals for the Fourth Circuit, at Richmond, Virginia, this 6th day of October, A. D., 1945.

Claude M. Dean, Clerk, U. S. Circuit Court of Appeals, Fourth Circuit. (Seal.)

[fol. 37] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed December 3, 1945

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Jackson took no part in the consideration or decision of this application.

[fol. 38] SUPREME COURT OF THE UNITED STATES

STIPULATION AS TO RECORD—Filed Dec. 31, 1945

Subject to the Court's Approval, It Is Hereby Stipulated and Agreed, by and between the attorneys for the respective parties hereto, that the record, filed on petition for certiorari, and now in printed form in the Supreme Court, shall constitute the printed record in this case for all purposes.

This 20 day of December, 1945.

G. Lyle Jones, Geo. H. Ward, Gilmer A. Jones, Richard S. Jones, Attorneys for Petitioner.

R. R. Rush, Attorney for Respondent.

This 24 day of December, 1945.